

Karabec, Zdeněk

**Účinnost právních nástrojů proti organizované kriminalitě (použití agenta)
The effectiveness of legal instruments in combating organised crime
(undercover agent)**

ISBN 978-80-7338-099-1

Summary

The effectiveness of legal instruments in combating organised crime and the ways by which they can be improved are key political problems in crime and also form the subject of criminological research.¹

Over the long term and in the present day, organised crime has represented a significant risk for society and the assurance of citizens' rights and freedoms. The dangers that organised crime represents are heightened by its transnational character and its infiltration of countries' political, economic, administrative and ruling structures.

The culmination of efforts taken to improve the effectiveness of measures against this dangerous form of crime on an international scale has been the adoption of the UN Convention against International Organised Crime (approved by the UN General Assembly 15 November 2000) and the related protocols. The Czech Republic signed the Convention but has yet to ratify it.

In 2009 at its 18th International Congress in Istanbul, the International Association for Criminal Law (Association Internationale de Droit Pénal – AIDP) emphasised that the criminal law reaction to international crime and other forms of serious crime must be the preserve purely of criminal justice bodies and that no other administrative measures may be permitted in this area which would replace the justice system. Every digression from the principles of due criminal procedure in prosecuting organised crime, particularly as concerns the use of special operational measures, must respect the principle of adequacy. Even in cases of public safety it is necessary to proceed by legal process in a manner respecting the rule of law. No charge or imprisonment may be founded on anonymous testimony or an illegal use of special operational measures. Persons suspected of involvement in the activities of an

¹ The study derives from research conducted by the ICSP, which concentrated on the legal regulation of operationally appropriate measures and the conditions of their use under Section 158 b-f of the criminal code (Act No. 141/1961 Coll. as amended), with special regard to the institute of using an agent according to Section 158e of the criminal code. Due to the theme and focus of the research task cooperation with police bodies was essential. The aim of the research was to ascertain the effectiveness of the stated legal measures and to indicate the possibilities by which their application can be made more effective.

organised criminal group who decide to cooperate with judicial bodies cannot receive immunity from prosecution but only a milder sentence.

In *pre-trial proceedings for investigations* into organised crime the fundamental human rights of the suspected and prosecuted persons must be respected. The involvement of the intelligence services, electronic monitoring, interception and similar measures which violate rights to privacy and infringe other human and civil rights should always be under the control of judiciary bodies. The term “fair trial” relates to all stages of criminal proceedings, not only to proceedings before the court. When using special operational measures and investigative techniques the principle of presumption of innocence and the right not to testify must be adhered to. The defendant’s rights should not be prejudiced. A so-called *proactive* investigation should be considered rather as exceptional procedures taken by the police bodies.

The European Convention on Human Rights is the core international document that has a direct influence on the legal regulation of such sensitive areas as the various activities of police bodies in combating organised crime in the various signatory countries.

The Czech Republic declared that it considered itself bound by the European Convention on Human Rights and its protocols (hereinafter the Convention) from 1 January 1993. On 30 June 1993 the Council of Europe’s Committee of Ministers adopted the decision that the Czech Republic is regarded as a party to the Convention with effect from the said date of 1 January 1993. The Convention explicitly states certain rights and freedoms that cannot be derogated and which form an absolute border for legislative, executive and judicial power in each state that joined the Convention and accepts it as the essence of the rule of law. This refers to the right to life (Article 2 of the Convention), the right to respecting personal integrity and human dignity (Article 3) and the principle of the rule of law and a prohibition on the retroactivity of the criminal code (Article 7).

These rights and liberties may often be affected by the use of operational means and devices and various special intelligence methods and techniques in order to prevent, detect and criminally prosecute organised crime. Even from the Convention’s perspective, a secret agent acting according to Section 158e of the Criminal Code of the Czech Republic, may find that his involvement and actions lead him into legally complicated situations.

Guarantees of a fair criminal trial cannot be forfeited for a person who himself has violated human rights; it is therefore necessary to reject the argument that such person should not make use of the Convention’s benefaction. It may be inferred that even in cases where operationally appropriate measures are used to detect and prosecute organised crime and in

the activities of an agent planted in a criminal environment it is not acceptable to exceed the guarantees of rights and freedoms stated in the Convention by referring to the criminal behaviour of the persons monitored or the criminal aspects of their personalities.

It is nevertheless clear that when detecting serious forms of crime the police bodies must in a democratic society also use secret methods and measures; in doing so, however, there is a risk that civil rights and freedoms may be unjustifiably affected and it is therefore necessary to safeguard effective judicial procedure by reducing this scope of pre-trial police activities and ensuring that the relevant methods and procedures will be in line with acts laid down by the criminal code. If this is the case then the evidence ascertained by methods and procedures supported by the criminal code can be used in all stages of criminal proceedings.

In the Czech Republic certain police methods and procedures have been designated together as operationally investigative measures, incorporated in the criminal code by its amendment No.265/2001 Coll. as amended, from 1 January 2002. Under Section 158b of the criminal code operationally investigative measures are understood to mean a sham transfer, monitoring of people and things, use of an agent. *The use of an agent is thus an act in criminal proceedings.* The criminal code (Section 158e) state the conditions for using an agent as follows: *(1) If criminal proceedings are initiated for a particularly serious crime, for a crime committed on behalf of an organised crime group, for the crime of receiving a bribe (Section 331 of the criminal code), for the crime of corruption (Section 332 of the criminal code), for the crime of indirect bribery (Section 333 of the criminal code) or for another intentional crime whose prosecution falls under the declaration of an international treaty which is binding for the Czech Republic, a police body, if this is a department of the Czech Republic police force, is authorised to use an agent.*

The use of an undercover agent is authorised by a High Court judge upon application by the prosecuting attorney of the High Prosecuting Attorney in the area in which the judge has jurisdiction. The prosecuting attorney is authorised to ask the police body for information necessary to determine whether reasons exist to use an agent and whether his activity is in accordance with the law; in this respect the police body is authorised to submit a record of use of the agent to the prosecuting attorney. If the prosecuting attorney finds that the reasons for using an agent have passed, he shall instruct the police body to dispense with the agent's use forthwith. This measure is clearly understandable as regards the due supervision of an agent's activity; on the other hand, however, it should be borne in mind that an agent's penetration of the world of organised crime and his efforts to obtain trust and knowledge in this area essential to develop operationally appropriate activity may be an extremely long-term affair.

Only a member of the Czech Police may act as an agent. The agent's tasks may not be conducted by another person, not even if that person is a civilian employee of the Ministry of the Interior, or a police officer who fulfils tasks within the Ministry of the Interior, or a soldier on active service authorised to fulfil the tasks of the police. On the other hand, an agent may be a member of a foreign security force.

When using an undercover agent it is necessary to assign certain material, financial and concealment measures for his activity. This applies especially to ensuring means of communication, transport means, various actions to conceal the agent's activities etc. When concealing his identity the agent is authorised to create a different personal identity and to enter details of this alternative identity in information systems, to conduct financial transactions for which special authorisation, permission or registration is required, and to conceal his membership of the Czech Republic Police Force.

In the provisions to Section 102a the criminal code provides heightened protection to conceal the true identity of an agent who is due to be examined as a witness before a court. The examination of an agent as a witness should only be used as an extreme means of evidence in cases where the facts required for a judicial decision cannot be proven by other material or written proof, records from the use of operationally appropriate measures etc.

A number of specialist articles have been published on the theme of police provocation. The prohibition on provocation should be understood as a prohibition on the behaviour by an agent that would cause someone else to decide to commit a crime. The specialist opinion prevails that police provocation is at odds with the principles of the rule of law and is a sign of disrespect for the rights and freedoms of the person and citizen. The impermissibility of police provocation also concerns the judiciary, particularly in reference to the decision by the European Court of Human Rights and by the related decision of the Constitutional Court of the Czech Republic. In 1999, the Constitutional Court for example stated (Senate judgement III. ÚS 597/1999) that part of the body of a crime, indeed of the whole succession of acts which comprises a crime (e.g. provocation or initiation of a crime, its completion etc.) constitute an impermissible violation of Article 39 of the Charter of Basic Rights and Freedoms and Article 7 paragraph 1 of the Convention on Human Rights and Fundamental Freedoms (in other words the actions of the state/police).

The use of an undercover agent as the initiator or provocateur of a crime is in a certain sense permissible, for example in the USA. There it concerns police activities which constitute the initiation of a crime for the purpose of its subsequent detection and the punishment of the culprit. Police operations of this type are considered to be an effective

measure for suppressing criminal activity which is secret and is perpetrated with the consent of the persons involved, such as drug crime, people trafficking, disseminating child pornography and other forms of crime corrupting morals. The crimes thus indicated take place under police control, which makes it possible to obtain evidence for the criminal prosecution of the persons involved in such crime. Police provocation is also considered a measure to deter criminal activity because the potential culprit cannot be certain that in any given situation he or she is not falling into a trap set by the police. On the other hand, police operations which make it possible for a crime to be committed can violate the police's obligation to protect the rights of third parties.

In the Slovak Republic a certain degree of police provocation is permissible. Under Slovak legal regulations, as laid down in Section 30 of Act No. 300/2005 Z. z., the Criminal Code, and in Section 10 paragraphs 19 and 21 and in Section 117 of Act No. 301/2005 Z. z., Criminal Order, an agent's actions must be proportionate to the illegality committed and which the agent undertakes to detect, ascertain or prove. The agent shall not initiate the commission of a crime; however, this will not apply if the case involves an act of corruption by a public official or foreign public official and the facts ascertained indicate that the offender would have committed this crime even if an instruction to use an agent had not been made.

In the Czech Republic the introduction of the so-called "*anti-corruption agent*" marks a government bill on anti-corruption measures which consists of the intended amendments to certain laws whose adoption should significantly affect the legislative conditions to combat corruption and serious crime related thereto. The bill seeks to ensure that an agent should be authorised to simulate interest in taking part in a crime and that this should not be considered police provocation. This is conditional upon the facts identified in the relevant case indicating that the person would commit the crime of corruption himself (i.e. even without the agent's participation). Such action by the agent shall not incite a person to commit a crime. The law as it stands does not expressly contain these conditions and practice has identified the need for the law to clearly enshrine the boundaries by which police officers can act proactively in these situations. Police activities must however primarily concentrate on documenting crimes, supplying evidence and preventing the consequences.

Stipulating a certain degree of immunity from prosecution and defining its limits and conditions is undoubtedly an essential legal prerequisite for the successful activities of a secret agent working against organised crime. The knowledge of a certain immunity from prosecution, even if strictly limited, is also an essential psychological prerequisite for such

activity. An agent who moves in a criminal environment and who conceals the actual purpose of his activity must have a certain legal space and personal freedom in deciding how to resolve many unforeseeable situations which could threaten his personal safety and the fulfilment of his professional missions.

Under Section 361 paragraphs 1, 2 of the Criminal Code a member of the Czech Police Force shall not be culpable of the crime of participating in an organised criminal group or supporting an organised criminal group if he committed such crime in order to detect the perpetrator of a crime committed to benefit an organised criminal group (Section 363 paragraph 1 of the Criminal Code).

Another exemption from criminal responsibility is afforded to a police officer who performs the tasks of an undercover agent, Section 363 paragraph 2 of the Criminal Code, which comprehensively states in all 42 various crimes for which the agent will not be prosecuted on condition that he committed one of the mentioned crimes in order to detect the perpetrator of a crime committed to benefit an organised criminal group. This exemption will not be accorded if the agent founded or engineered the organised criminal group or organised group.

According to the practical experience of police bodies the legal regulation covering an agent's immunity from prosecution remains a current and unresolved problem. The extent of an agent's immunity from prosecution would evidently be better to solve not by a full list of crimes stated in Section 363 paragraphs 1, 2 of the Criminal Code but by expanding the circumstances excluding illegality which are stated in the provisions of Sections 13, 14 and 15 of the Criminal Code.

In January 2010 the Czech Ministry of the Interior submitted a proposal for measures which if implemented should increase the effectiveness of the measures aimed at combating corruption and organised crime. These are:

- introducing the institute of “crown witness”,
- amending the institute of “using an undercover agent”,
- amending the conditions for using telecommunications interceptions,
- amending the conditions of confidentiality according to tax rules.

The research requested that the national departments of the Criminal Police and Investigation Service (hereinafter SKVP) collect the opinions of experts – police officers who are involved in combating organised crime on the current legal regulation of the institute

governing the use of an agent and on the practical possibilities of improving the effectiveness of this institute.

The following departments were addressed: the SKPV Special Operations Department (hereinafter the ÚSČ), which is empowered as the sole police body with the legal and organisational safeguarding of the institute of using an agent; the SKPV Department for the Detection of an Organised Crime (hereinafter the ÚOOZ), and the SKPV National Anti-Drug Headquarters (hereinafter the NPC). These are the police bodies that have most frequent recourse to the use of an agent in detecting and proving serious criminal activity.

To these departments was distributed a list of questions covering the main problems concerning the practical use of the institute of using an agent; the list was accompanied by a request that questionnaires and controlled interviews be used with police officers employed in the stated departments in order to collect and summarize their expert opinions and findings with regard to the use of an agent in operational activities.

Even though for understandable reasons this study did not address the effectiveness of the real use of an agent in concrete criminal cases or the frequency or character of the cases in which the use of an agent was applied, the information proceeding from the experts questioned makes it possible to conclude that the agent, as an often irreplaceable operationally appropriate and procedurally useful instrument, should be used more often when combating serious crimes. The existing legal arrangement of the institute for the use of an agent (or other operationally investigative instruments) is of a relatively high quality, and is considered in principle to be satisfactory from the perspective of the police's executive departments.

Translated by: Marvel s.r.o.